SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF: JOHN RUFFALO, JR.,

Petitioner.

BRIEF OF PETITIONER

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

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REFERENCE TO OPINIONS BELOW.

The opinion of the United States Court of Appeals is reported in 370 F. 2d 447 and is reprinted in Appendix C. Opinions of other courts which have passed upon the matter are printed in full in the appendix. The opinion of the Supreme Court of Ohio, which originally imposed indefinite suspension on Petitioner, is reported in 176 Ohio St. 263, 199 N. E. 2d 396 (1964), reprinted in Appendix A.

Thereafter the District Court of the United States for the Northern District of Ohio, Eastern Division, served motion to show cause on Petitioner, and after full hearing refused to suspend him in that court. The opinion is reported in 249 F. Supp. 432, reprinted in Appendix B. After the decision by the Court of Appeals the District Court conformed its decree to the decree of its superior court. The second memorandum opinion of the District Court, not officially reported, is reprinted in Appendix D.

JURISDICTIONAL GROUNDS.

The United States Court of Appeals entered its decree striking the name of Petitioner from the roll of its counsel on December 29, 1966. Petitioner filed petition for a writ of certiorari, within 90 days, on March 24, 1967, invoking

the jurisdiction of this Court under 28 U. S. C., Section 1254 (1). The writ of certiorari was granted on October 9, 1967.

It is also suggested that Petitioner is a member of the bar of this Court, and pursuant to Rule 8 is subject to suspension from practice before this Court, but with opportunity to show cause why he should not be disbarred. This Court may consider this brief as Petitioner's showing of cause why he should not be disbarred from practice before the Supreme Court of the United States, formal notice to show cause being waived.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF PRACTICE AND CANONS INVOLVED.

1. Amendment V, Constitution of the United States.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Amendment XIV, Constitution of the United States.

"*1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. U. S. C. Title 45, Section 60.

"*60. Voluntary furnishing of information not to be prevented.*—Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports."

4. Rules of Practice of the Supreme Court of Ohio.

Rule XXVII (published at pp. lxxvi-lxxxiv, 167 Ohio St. Reports):

Disciplinary Procedure. Pursuant to the powers of this Court over the Bar of this State and the members thereof Rule XXVII is hereby amended as follows effective January 1, 1957; and to remain in force until altered or abrogated.

(1) There is hereby created as commissioners of this Court a Board of Commissioners on Grievances and Discipline * * *.

(3) Said Board of Commissioners shall consist of seventeen (17) members * * *.

(5) *Definition of Misconduct.* Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to the practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

(8) A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as Respondent * * *.

(10) After Respondent's answer has been filed * * * a formal hearing shall be held * * * by a panel of Commissioners appointed by the Chairman of the Board of Commissioners * * *. Such panel shall consist of three (3) Commissioners * * *.

(13) If the panel finds and determines that the Respondent is guilty of misconduct and that * * * indefinite suspension * * * is merited, the panel shall make its certified report * * * and shall file the same * * * with the Secretary of the Board of Commissioners.

(15) If the Board of Commissioners determines that a * * * suspension * * * is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings * * * in the office of the Clerk of this Court.

(19) Upon failure of the Respondent to file objections, or after consideration of such objections and such briefs as may be filed for and against the same, and after hearing, if requested by this Court, this

Court shall enter such order upon the matter as it may find proper * * *.

(37) The process and procedure under this rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint * * * may be made at any time prior to final order of the Court * * *.

Rule XXVIII. Rules of Professional Conduct. (Published in 167 Ohio St. at p. lxxiv).

Section 1. These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension, or by disbarment, as provided in Rule XXVII of the Rules of Practice.

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof.

5. Rules of the Supreme Court of the United States.

Rule 8. DISBARMENT:

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no

order of disbarment will be entered except with the concurrence of a majority of the justices participating.

6. Canons of Professional Ethics of the American Bar Association.

Canon 10. The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

Canon 42. A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement.

THE QUESTIONS PRESENTED FOR REVIEW.

One question presented is whether a trial lawyer with a substantial FELA practice should be disbarred because he hired a railroad employee, a night-shift car inspector, to work for him on a piece work basis during off-days and off-duty hours to find and interview witnesses, drive witnesses to court, and advise the lawyer on railroading customs and practices in cases some of which involved the particular railroad which was the general employer of the investigator. A subsidiary question is whether, if hiring such an employee to do investigating work is to be considered a disbarment offense, due process requires that there be some form of advance definition and notice that such conduct is prohibited.

Another question is whether a lawyer with an extensive litigation practice, in a state which does not prescribe any form of record keeping as a condition of practice, is required to make book entries or create financial records to prove he has not solicited cases; is required to preserve such records; and is required to

produce them on request when charged with professional misconduct on pain of an inference of guilt justifying disbarment for failure to create, preserve, and produce exculpatory records.

If this Court reviews the findings and opinion of the Ohio Supreme Court in order to determine whether, under its own Rule 8, Petitioner should be stricken from the roll of practitioners admitted to its bar, then the Court may consider whether it is a disbarment offense for a lawyer to make occasional loans to a few needy clients to enable them to survive, when there is no promise to make such loans given in advance as an inducement to retain the lawyer's services.

STATEMENT OF THE CASE.

The petitioner was ordered indefinitely suspended from the practice of law by the Supreme Court of Ohio on May 20, 1964, on two findings of alleged misconduct. That order is final and is not here subject to review. Petitioner does not question the findings of fact as to his conduct, but insists that his conduct was not wrongful, and not unethical.

Thereafter the District Court of the United States for the Northern District of Ohio ordered the petitioner to show cause why he should not be disbarred in that court. The District Judge accepted the findings of fact of the Ohio Court but disagreed with its legal conclusion. He found there was no misconduct, and no reason to disbar petitioner, and refused to suspend him from practice.

The Court of Appeals for the Sixth Circuit in turn ordered petitioner to show cause why he should not be stricken from the roll of that Court on the basis of the state disbarment order. The Court of Appeals reviewed the record of the state disbarment proceedings and con-

cluded, in the majority opinion, that one of the two charges did not justify discipline but that the lone charge of hiring an "undercover agent" did sustain the state court discipline and required petitioner's disbarment from practice before the Court of Appeals. The minority opinion of the Court of Appeals, dissenting, found that neither charge of misconduct on the conceded facts justified suspension from practice and approved the decision of the District Court.

There is no factual dispute to review. Petitioner was an active trial lawyer with offices in Youngstown, Mahoning County, Ohio. He handled many FELA cases in Ohio and in nearby areas of Pennsylvania. For many years the Claims Research Bureau of the American Association of Railroads sent an investigator to see every client of Petitioner after final disposition of the client's claim, in an effort to discover any kind of misconduct in obtaining or handling the case. (R. 770-773.) A very few disgruntled former clients made claims of impropriety which the American Association of Railroads then turned over to the President of the Mahoning County Bar Association, who was also the defense counsel in the Youngstown area for the B. & O. Railroad. (A. 21a.) The Mahoning County Bar Association then filed ten charges against the Petitioner.

Under Ohio practice charges are first heard by a panel of three members of a standing Board of Commissioners on Grievances and Discipline. The findings and recommendation of the three-man panel are then reviewed by the full seventeen-member Board, which in turn presents findings and recommendations to the Supreme Court of Ohio (Rules of Practice, Rule XXVII, *supra*, pp. 3-5). The Supreme Court of Ohio is itself the ultimate fact finder, and said in this case:

"This court has full responsibility for determining what the facts are and what action should be taken on those facts." (A. 2a.)

The Petitioner here was the Respondent below. The charges against the Respondent in those proceedings, and their disposition, may be summarized as follows:

Charge 1. That Respondent had failed to pay certain costs assessed against him in a 1957 disciplinary proceeding. The panel itself dismissed this charge.

Charge 2. That Respondent solicited the claim of Mrs. Clara Beighley against the B. & O. Railroad. The Board of Commissioners did not agree to any conclusion on this charge.

Charge 3. That Respondent, through an authorized agent, solicited the claim of Mrs. Naomi Clark against the B. & O. Railroad. The panel and the Board sustained this charge, but the Supreme Court of Ohio could not agree that it was proven by a simple preponderance of the evidence.

Charge 4. That Respondent solicited, through Michael Orlando, the claim of Sam Cotellesse against the P. & L. E. Railroad. The panel itself dismissed this charge for want of any evidence.

Charge 5. That Respondent attempted to solicit, through Michael Orlando, the claim of James Quinn against the B. & O. Railroad. The panel itself dismissed this charge for want of any evidence.

Charge 6. That Respondent personally attempted to solicit the claim of one Andrew Buletko against the P. & L. E. Railroad. The panel itself dismissed this charge.

Charge 7. That Respondent, through Louis McKinney, solicited the claim of Mrs. Rakestraw. The panel itself dismissed this charge.

Charge 8. That Respondent advanced loans to Mrs. Beighley, Mrs. Clark, and Sam Cotellesse while handling their claims and deducted the advances from settlements later received. No evidence was offered as to Sam Cotellesse. Respondent admitted loans to his clients, Mrs. Clark and Mrs. Beighley. The panel, the Board and the Supreme Court of Ohio found that such conduct warranted suspension. The Court of Appeals did not rule that this charge warranted disbarment.

Charge 9. That Respondent promised to advance money to Andrew Masters at the time he took his case, and later did advance money during the pendency of the case. The panel and the Board found this charge was sustained, but the Supreme Court of Ohio failed to agree.

Charge 10. That Respondent was guilty of attempting to influence Elijah Doster to sign a false statement, and influenced him by paying him $50.00 The panel and the Board sustained this charge in part, finding that a payment of $50.00 was made (as a refund of medical expenses), but the Supreme Court of Ohio disagreed. It could not find payment was made with a purpose of influencing testimony.

The sole original charge, on which discipline was imposed by the Ohio Court, was the making of loans to the two widows. Further detail as to those loans will be given in the argument that such loans, under the circumstances of their making, were not improper.

During the course of the hearings before the three-man panel, counsel for the Mahoning County Bar Association, as Relator, offered four new charges as amendments to the original complaint.

Charge 11 was to the effect that Respondent attempted to intimidate the witness Sam Doster. The Board

sustained the charge. The Supreme Court of Ohio found it not proved.

Charge 12 was to the effect that Respondent attempted, through an agent, to intimidate the witness Andrew Masters. Although sustained by the Board, this charge was not sustained by the Supreme Court of Ohio.

Charge 13 was added after the Respondent Ruffalo and Michael Orlando had both testified on the solicitation charges involving Orlando, denying any procurement of cases by Orlando and describing his work as that of an investigator. The panel accepted an amendment to the complaint:

> "That Respondent did conspire with one Michael Orlando, and paid Orlando monies for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all of the time extending from 1957 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company." (A. 127a, 131a.)

The panel and the full Board sustained Charge 13. The Supreme Court of Ohio found the charge proved by the admissions of Petitioner and Orlando, made before the charge was added by amendment, and conceded after amendment. The United States District Court found that as a fact Petitioner did pay Orlando to help him prepare cases, but that this was not misconduct. The Court of Appeals for the Sixth Circuit found, two to one, that the use of Orlando in cases against the B. & O. Railroad was so unethical as to justify disbarment.

Charge 14, added by still later amendment, was to the effect that Petitioner had solicited the case of a minor child by solicitation of the parents. The panel itself dis-

missed the charge for want of evidence. (The above charges and findings are summarized in the District Court opinion. (A. 21a-23a.) The findings of the Ohio Supreme Court are reported in its opinion. (A. 1a-15a.))

We do not propose to review herein all the evidence on all the charges. The hearings were long (over 1,000 pages) and bitter. The record is extraordinary. Two officials and two investigators of the American Association of Railroads participated throughout the hearings. (A. 24a.) Evidence that the Respondent had attempted wrongfully to influence witnesses was matched by proffered evidence that the Railroad Association's representatives were warping testimony by bribery, slander and deceit. Key witnesses for the Relator were contradicted by members of their own family. One witness recanted completely. It is understandable that the Ohio Supreme Court, reviewing the hearing transcript, said:

> "The members of this court are not in agreement as to whether the facts are as the board of commissioners recommended they should be found with respect to some of the other charges against respondent." (176 Ohio St. at 269, 270, A. 9a.)

The United States District Court, reviewing the transcript, decided that its consideration would have to be limited to the two charges, No. 8 and No. 13, which were undisputed and which alone had been found sustained by the Ohio Court. (249 F. Supp. at 439, A. 29a.)

The dissenting judge in the Court of Appeals said that, being unable to agree that Charge 13 warranted disbarment, he searched the record "for a possible concurring opinion which [he] thought would be founded upon the ambulance chasing and witness tampering findings of the Ohio State Bar." He concluded:

> "To abbreviate a lengthy recital and weighing of a record of over 1,000 pages of transcript, I note that I simply could not find reliable evidence upon which to approve these findings." (370 F. 2d at 463, A. 85a.)

We deal, then, with a case that involves just two findings of fact on just two charges of unethical conduct, on both of which the evidence was freely conceded by the Respondent below, the Petitioner here. These are Charge 8 —loans to two poor clients, and Charge 13—hiring the ordinary yard laborer to help prepare railroad cases. The District Court, accepting the facts as true, refused to disbar. The Court of Appeals said it would not disbar on Charge 8 "standing alone," and that it did "not reach that question." It found that Charge 13 justified disbarment. (370 F. 2d at 450, A. 58a.)

The District Court then filed its second memorandum opinion saying that despite its "abiding conviction that [its earlier] findings and conclusions * * * are correct" it would "faithfully respect and defer to the opinions of its circuit court of appeals." (A. 87a.) It seems clear that if this Court reverses the decision of the Court of Appeals, the District Court will be free to reconsider, and will readopt its first findings and conclusions.

One final point should be noted in the statement of facts. Both the Ohio Supreme Court and the Court of Appeals justify the severe penalty of disbarment in part upon a 1957 disciplinary action against Petitioner. It is true that under an earlier type of disciplinary proceeding in Ohio, before the present Rule 27 was adopted, a complaint of solicitation was lodged in Common Pleas Court against Ruffalo late in 1956. He pleaded nolo contendere and was given private reprimand in early 1957. Charge 1 in the later proceedings was that he had not paid the costs. Evidence showed the costs had never been billed; but that

Ruffalo had ordered out the bill when the hearings began on the 1962 charges and had paid the account. (R. 16-22.) The charge was then dismissed. (R. 1024.) Petitioner has always insisted that after the consent decree in 1957 he committed no act of solicitation. The findings of fact by the courts below support him.

The charge of *old* solicitation does not justify an inference of recent solicitation, or other wrongdoing. It does have a bearing on the punishment to be meted out if Petitioner were guilty, but it is not evidence of present guilt on the new charges laid in 1962. The panel agreed fully with this principle. (A. 105a.)

The one finding of fact and issue of law squarely presented for review concerns Charge 13—the hiring of Orlando. Michael Orlando was a car inspector for the Baltimore & Ohio Railroad who worked on the night shift, from 11:00 p.m. to 7:00 a.m., bleeding the air hoses of incoming cars. In his off-duty hours and on his off days Orlando worked from time to time for the Petitioner Ruffalo. His work was described generally as investigating practically all the railroad cases, finding witnesses, and driving them to court at Petitioner's request. (A. 139a.) In addition, he advised Petitioner about the technical aspects of railroading. (A. 126a.)

Orlando was paid on the basis of $25.00 per day worked, plus his expenses. In 1957 he was paid $2,950; in 1958, $1,250; in 1959, $1,237.37; in 1960, $3,829.25; and in 1961 he was paid $2,716 for services until July, when he was hospitalized. At that time there was a dispute between Ruffalo and Orlando about the value of older services when Orlando had spent time unsuccessfully trying to locate witnesses, and accumulated unreimbursed expenses. This was settled between them at an agreed round figure of $2,000. (A. 140a.) The total figure for

the four and one half year period was $13,982.62—an average of $3,107 per annum—but no breakdown between work hours and expenses was developed in the testimony. This pay was, of course for all work in all cases, not just those in which the B. & O. Railroad happened to be involved.

The mere fact that Orlando, as a general employee of the B. & O. Railroad, did part-time work in helping to prepare cases against that railroad was held by the Ohio Supreme Court and the Court of Appeals to justify harsh discipline. Neither court cited any Canon of Ethics, any statute, or any case law precedent in support of the ruling that it is a disbarment offense for a lawyer to use, in his client's behalf, the services of an ordinary, non-fiduciary employee of the defendant in a lawsuit.

ARGUMENT.

The function of the federal courts in applying the results of a state disbarment proceeding to a federal practitioner was unanimously stated in *Theard v. United States*, 354 U. S. 278, 281-282 (1957):

> "While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. * * *
>
> Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. If the accusation rests on disbarment by a state court, such determination of course brings title

deeds of high respect. But it is not conclusively binding on the federal courts. The recognition that must be accorded such a state judgment and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling v. Radford*, 243 U. S. 46. The short of it is that disbarment by federal courts does not automatically flow from disbarment by state courts."

In *Selling v. Radford*, 243 U. S. 46 at 50, 51, this Court held:

"[We] should recognize the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1, that the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice we were constrained to do so."

Petitioner does not request this Court to go behind the findings of fact of the Ohio Supreme Court, nor of the Court of Appeals. This case rests upon the basic proposition that the conduct established by the record—using Orlando and making occasional small loans—far from showing want of fair character, moral turpitude or violation of any Canon of Professional Ethics was proper, permissible, and showed commendable devotion to the best interests of his clients. It was conduct which, judged by

any rational standard of a lawyer's duties, deserves no censure.

Charge 13 Does Not Charge Professional Misconduct.

Petitioner had an active trial practice, and the majority of his cases were FELA actions for injured railroad workers. The essence of good trial work is thorough preparation, and Petitioner, zealous to protect his client's interests, investigated his cases well.

The best man to investigate any case is a man familiar with the field. A truck driver knows trucking practices. A seaman knows the ways of ships. A railroader knows railroading. The work of a railroad yard is strange to an outsider. Brakemen speak in a jargon of their own, not overly intelligible to outsiders. The difference between a "kick," a "shove" and a "drop" may be a critical difference in the case. Trial evidence concerning yard layout, equipment, and local custom and practice usually necessitates calling employees from the yard or road in question, but these employees are clannish men, not likely to talk freely to a stranger. Obviously, the best man to hire to help a lawyer prepare a railroad case is a railroader, and Petitioner hired one—Michael Orlando.

There was no evidence that Orlando ever investigated any case in the yard where he worked as a car inspector. There was no evidence that he ever did any investigation work when he was supposed to be on company time. There was no credible evidence in the record that he ever solicited a case for Petitioner. He had no access to any confidential information, and no claim was made he ever revealed secret matters or breached any trust.

No question was raised as to the propriety of Orlando investigating cases against the Pennsylvania, New York Central, or other railroads. The Baltimore & Ohio was his

general employer, and both Petitioner and Orlando freely admitted that Orlando had investigated and transported witnesses in some cases involving that railroad.

This was one of the two grounds on which Petitioner was suspended by the Supreme Court of Ohio, and the sole stated ground on which he was disbarred by the Court of Appeals for the Sixth Circuit.

The charge against Petitioner, added by amendment to the original charges after Petitioner and Orlando had testified, was:

> "That Respondent [Ruffalo] did conspire with one Michael Orlando, and paid Michael Orlando moneys for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando during all of the time extending from 1953 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company." (A. 127a. Amended to "1957" instead of 1953 at A. 131a.)

Was it "legally wrong" for Orlando to contact any witness in a lawsuit against the B. & O. Railroad? It is perfectly proper for a trial lawyer himself to interview the defendant's employees. He properly may interview *any* witness, not a party, without the consent of his opponent. The lawyer's right to interview railroad employees is protected by a special act of Congress. There used to be a standard rule forbidding the railroad employee from telling the truth to the attorney or the investigator for an injured fellow employee. He would be fired for talking to anyone but his own claim agent. Congress intervened to prevent the intimidation of employee witnesses by enacting Section 60 of Title 45, U. S. C., which strikes down as void any rule designed to prevent employees of a common carrier from furnishing information to any person in in-

terest as to the facts incident to the injury or death of any employee. The act further makes it criminal to attempt to discipline an employee for furnishing such information.

It is a valuable right, protected by federal statute, for the lawyer to interview witnesses. The effect of the decision below is to hold that the lawyer must exercise this right in person and cannot hire a fellow-employee of his own client to get the information.

Was it improper for Orlando to investigate cases when he was a general employee of the Baltimore & Ohio? The National Railroad Adjustment Board has expressly approved the practice, saying:

> "On the other hand there is no doubt whatever of the right of an employee, when off duty, to assist an injured employee or his representative in any manner including the gathering of evidence and so long as it is limited to the development of truth it cannot be regarded as disloyalty nor afford just grounds for discharge." Award No. 3624, 21 N. R. A. B. 63 (1st Div. 1939).

It was proper for the railroad employee witness to give information to Petitioner or to Orlando, and it would have been a federal crime for the railroad to attempt to prevent it. It was proper, under a National Railroad Adjustment Board ruling for Orlando to assist his fellow employee in "gathering evidence." Such conduct, leading to the development of the truth, "cannot be regarded as disloyalty," said the Board. It was proper for Ruffalo himself to find and interview witnesses. The decisions below reach a strange result in holding that what Ruffalo could properly do, what Orlando could properly do, and what the witness could properly do, became grounds for disbarment when Ruffalo had Orlando do it.

The duties of "loyalty," if any, of Petitioner and Orlando were not the same. The duty of Ruffalo as an attorney representing a client was to obtain all the evidence he could find in any way that did not require illegality, fraud, or "corruption of private trust." He had no obligation to protect the sensibilities of the B. & O. Railroad. Orlando would be expected to have some feelings of loyalty to his fellow-employees, and might be expected to have some feelings of loyalty toward his employer—but was under no mandate of loyalty to his employer when off duty. In the same way, the railroad claim department would have employees whose duty it was to investigate the claims of fellow-employees. Their "loyalty" to the employer in trying to destroy an injured employee's claim might be considered as disloyal to the fellow-employee, but certainly not immoral nor illegal.

If it be conceded that Orlando's work for Petitioner was "disloyal" to the B. & O. Railroad (but not illegal or immoral or disloyal enough to warrant discharge) does it follow that Petitioner as his second employer should be suspended? Petitioner had no duty of loyalty to the railroad defendant. His duty to his client was paramount, and it might be malpractice on his part not to use the available services of the best investigator he could get.

The Ohio Supreme Court took a different view, saying:

> "In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar." (176 Ohio St. at 269, A. 8a.)

The majority opinion of the Court of Appeals said:

> "We do not believe we should tell today's society that notwithstanding the respect we ask it to give us

> as a profession of skillful and high minded men, we do not have the ability to adequately represent our clients except through planting secret agents in the shops of those we call to account in the courts. If this kind of espionage has become a way of life in some of today's business competition, such reality should not prompt us to say that no more is expected of today's lawyers than that they conform to the minimal standards of the market place." (370 F. 2d at 453, A. 64a.)

The language is overly prim. It would compel the disbarment of every district attorney who ever used the services of a paid informant. It assumes that Ruffalo "planted" a "secret agent" when the fact is that Orlando was simply a laborer. The work of contacting witnesses and driving them to the courthouse hardly justifies the epithet of "espionage."

We do not believe that the public would be shocked if a lawyer preparing a case against an interstate motor carrier asked a driver for that carrier to come in and tell him the usual routes, truck stops and running times—and paid him for his time lost when he cooperated. The public would be more interested in knowing whether the lawyer made a good investigation, found out the truth, and represented his client well.

In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1 at 7 n. 13, this Court cited with approval a statement by Justice Roger Traynor:

> "Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty. Canons of ethics that would operate to deny to the railroad employees the effective legal assistance they need can be justified only if such a denial is necessary to suppress professional conduct

that in other cases would be injurious to the effective discharge of the profession's duties to the public. *Hildebrand v. State Bar*, 36 Cal. 2d 504, 522, 225 P. 2d 508, 519 (1950)."

To like effect it was said in *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, at 239 (1957):

> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

It is not enough to justify suspension to say that the public will respect attorneys more "as high-minded men" if an attorney never uses a paid informant or uses the facts furnished by a defendant's employee who wants to right a wrong done to a fellow-employee.

> "While it is true that a professional standard is not to be judged by lay understanding, it also is true that when a practice, which is reasonable from the laymen's point of view, runs afoul of a professional standard the burden of justification is on the profession. It is not met by a mere reiteration of a rule." Schwartz, *Group Legal Services in Perspective*, 12 UCLA L. Rev. 279, 283.

A further point should be noted. Orlando's work was concerned with FELA cases, in Pennsylvania where he lived, and in Ohio. No other state has ever held that a general railroad yard worker cannot, in his free hours, do investigative work to assist in a fellow employee's case. No canon, or rule of practice, bar association opinion, or court decision can be found which forbids the practice. Ohio has now so held, after the fact, in the

Ruffalo case, and the Court of Appeals for the Sixth Circuit has said that it cannot "find totally invalid the view" that one who uses such an "undercover agent * * * does not exhibit the fair character and integrity which should be the mark of a lawyer." (370 F. 2d at 453, A. 63a, 64a.)

This means that in Ohio, and perhaps in the four states of the Sixth Circuit, injured railroad workers will be deprived of a kind of investigative aid available to their brothers in all the other states. Claimants under FELA are not to be prevented from putting forward their claim by local oddities. This Court has said that, "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359 (1952). This principle is specifically applicable to disciplinary actions against lawyers. "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

The federal courts recognize a duty not to disbar "except upon the conviction that under the principles of right and justice [they] are constrained to do so." *Selling v. Radford*, 243 U. S. 46 at 50. The disbarment of Petitioner upon the sole ground that both he and the B. & O. Railroad used Orlando's services at different times is arbitrary, unprecedented, in derogation of the rights of FELA claimants and unsupported by any principle of right and justice.

Lawyers Are Entitled to Fair Notice of the Limits of Permissible Conduct.

It has been settled for the last one hundred years that disbarring a lawyer, presumptively to protect the public, has the effect of punishing the lawyer, and laws with such an effect must meet the tests applicable to a penal statute. *Ex parte Garland,* 4 Wall. 333 (1867). Penal statutes must give fair notice of what it is that is commanded or forbidden.

This Court has repeatedly held that:

> "* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.,* 269 U. S. 385, 391.
>
> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U. S. 451, 458.
>
> "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refining Co. v. Corporation Com. of Oklahoma,* 286 U. S. 210, 243.
>
> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits, or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania,* 382 U. S. 399, 402-3.

The dissenting judge in the Court of Appeals recognized the force of these decisions, saying:

> "In order for a lawyer properly to be found guilty of an offense and barred, perhaps forever, from the practice of his profession, he should have advance notice that the act he was charged with was an offense, and prior to his hearing he should have written notice of the charge made against him. Respondent here had neither. * * *. Even more to the point, the Ohio Bar Association and the Ohio State Supreme Court were unable to cite any canon of ethics which purported to forbid respondent's conduct in hiring Orlando. Neither do my colleagues. Nor is any prior ethics opinion or case precedent cited for the holding here." (370 F. 2d at 462, 463, A. 84a.)

The majority opinion holds that lawyers are not entitled to due process, and are compelled to guess at what some judge may later decide is morally unacceptable. The majority said:

> "They do, however, assert deprivation of due process in that prior to Ruffalo's described use of Orlando, he was never told that such would be looked upon as misconduct. They complain for him that no Canon of Ethics had ever been promulgated forbidding this practice. We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge, and then fashion and announce a Canon of Ethics to fit each act of misconduct. Surely our profession is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior." (370 F. 2d at 454, A. 65a.)

Petitioner did need a definition in advance, and he was entitled to it. He was the more entitled to it because the Rules of Practice in Ohio specifically define misconduct in terms which appear to make his actions permissible. Rule XXVII (5) says that:

> "Misconduct, as the term is used herein, means * * * any violation of the Canons of Professional Ethics * * * or the commission or conviction of a crime involving moral turpitude." (*Supra* p. 4.)

The only Canon which bears even remotely upon the matter of using Orlando's off-duty services is Canon 32, which says that a lawyer should not:

> "render any service or advice involving * * * corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public."

It is self-evident that a night-shift railroad car inspector, whose job is to bleed air hoses of incoming trains, does not exercise any private trust. Hiring such an employee to interview witnesses or drive them to court is not a crime involving moral turpitude. Petitioner did not commit any crime or violate any Canon in using Orlando's services. If it is a deprivation of due process to penalize a citizen for violating a regulation too vague and indefinite to prescribe an objective standard, it must be a greater deprivation to punish him for violating some standard of conduct which is unpublished and unenunciated.

The same argument holds true with respect to the occasional loans to the poor and afflicted. Canon 10 as written prohibited only a purchase of an interest in the very subject matter involved in the litigation. It did not prohibit loans. Canon 42 as written prohibited payment of "expenses of litigation." It did not prohibit advances to cover the expenses of eating and keeping warm. The decision of the Ohio Supreme Court which held that Petitioner violated these canons "in effect" by non-prohibited conduct amounts to a retroactive expansion of the narrow regulating language.

The situation is much the same as that in *Bouie v. Columbia,* 378 U. S. 347, where a state court had held that a statute defining criminal trespass as "entry upon the lands of another * * * after notice * * * prohibiting such entry" was violated by remaining on the premises without consent after a lawful entry. This Court said in *Bouie,* 378 U. S. 347 at 352:

> "When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required to 'speculate as to the meaning of penal statutes' as in *Lanzetta,* or to 'guess at [the statute's] meaning and differ as to its application,' as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

In summary on this point: Ohio could suspend Petitioner, under its Rules of Practice, only for "misconduct." "Misconduct" was defined as "any violation of the Canons of Professional Ethics." Petitioner's conduct did not violate any Canon. He was disbarred notwithstanding, on the ground that a lawyer "is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior."

We submit that even lawyers have the constitutionally protected right to advance definition that the Fourteenth Amendment gives to all other citizens. Due Process is flouted by a rule that a trial lawyer's livelihood will depend on the particular moral sensibility of a particular

judge on a particular day, even though none of the 47 Canons of Professional Ethics have been violated.

Petitioner Was Not Required to Prove His Innocence by Creating, Preserving and Producing Exculpatory Records.

A study of the opinions of the Ohio Court and the Court of Appeals will compel the conclusion that Petitioner was deprived of his right to practice on suspicion, innuendo and inference both unwarranted in fact and prohibited by the Fifth and Fourteenth Amendments. The court below relied heavily on the argument that Petitioner should have produced records to prove his innocence, and the absence of such records justified an inference of guilt.

In the original ten charges against Ruffalo, Charge 4 specified that he had solicited the claim of one Sam Cotellesse against the P. & L. E. Railroad through an agent, Michael Orlando; and Charge 5 specified that he solicited the case of James Quinn against the Baltimore & Ohio Railroad through an agent, Michael Orlando.

There was not a word of evidence to sustain either charge, and the three-man hearing panel dismissed them on motion at the conclusion of the Mahoning Bar Association's case. Both Ruffalo (called for cross-examination) and Orlando testified emphatically that Orlando had not solicited any cases, had not been paid for procuring cases, and had done no work except that of an investigator. Ruffalo testified that he knew the railroad would be angered and would seek reprisal against Orlando if they knew he did off-duty work for Ruffalo. (A. 122a-125a.) In an effort to protect Orlando against railroad charges and hearings Ruffalo long ago decided to pay him in cash out of an investigating fund. (A. 91a.) Ruffalo kept a record of annual disbursements for income tax reporting, and

brought in the income tax information forms. Orlando reported his income and expense, and offered to bring in his tax returns.

The Chairman of the hearing panel then requested Ruffalo to bring in all his records—ledger books, checks, and all other records of income and expense. Ruffalo protested, saying that only records of payments to Orlando had been subpoenaed, and he had produced the Form 1099 records which gave that information.

Petitioner said:

> "I don't think they should have a right to just go down through my ledger and look at everything that is in my ledger * * *. I wish to object to it strongly. I think it is entirely improper * * * just to go through my records here to find out what they can find of any kind of a nature that they might try to throw against me here in this thing and to amend their complaint on what I did here, I don't think they should do that." (A. 106a-107a.)

The Chairman did not pursue his request for records beyond those subpoenaed after the protest by Petitioner, and had the record show that the papers showing record of payment had been produced as called for by the subpoena. (A. 108a.)

The majority opinion of the Ohio Supreme Court said:

> "Why did respondent (Ruffalo) not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis they were no longer needed to sustain their income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando * * *. It is difficult to believe that the 1961 federal income tax returns of either Orlando

or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any *records showing either of them to be innocent of charges of soliciting would be helpful to both.* It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B. & O. and against Ruffalo in the proceedings brought against him." (176 Ohio St. at 268-269, Emphasis added. A. 7a, 8a.)

The Court of Appeals for the Sixth Circuit adopted a rule of guilt by suspicion, saying:

"Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this Court *had, and have, the right to draw inferences as to what this conduct portrays.* The absence of records would not hide *what was going on* if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?" (370 F. 2d at 453, A. 64a. Emphasis added.)

These statements show absolute disregard for Ruffalo's constitutional rights. Let us assume for purpose of argument that Ruffalo was really guilty of solicitation through Orlando. If he were, then he had his Fifth Amendment right, absorbed into the Fourteenth, to refuse to produce records which showed it. If he did refuse, then no inference could be drawn therefrom and the penalty of disbarment could not be inflicted as the price of asserting the privilege. *Spevak v. Klein,* 385 U. S. 511 (1967).

If Ruffalo had a right not to produce any records he certainly had the corollary right to destroy any records he

did have. If he had a right to destroy them, he must certainly have the right not to create self-incriminating records in the first instance.

The privilege against Self-Incrimination must include the right not to make records and not to keep records, as well as the right not to produce them. If Ruffalo were really guilty of solicitation, then no suspicion of guilt, or inference of guilt, drawn from a destruction of receipts or a failure to keep detailed financial records could justify his disbarment.

Assume on the other hand that Ruffalo is as innocent of the unproved charge of solicitation as he insists he is. When demand for the records was made he refused, properly, to produce his general financial records, and said that any detailed records as to Orlando were either never in existence or were, in the case of old cash receipts, discarded. He produced the only records he had—the income tax forms giving annual totals. If he denies guilt, is he required to produce records to prove affirmatively his innocence? This would lead to the incredible result that constitutional immunities protect only the guilty and not the guiltless.

Petitioner's failure to create and preserve records to prove his innocence cannot give the United States Court of Appeals the right it claims "to draw inferences as to what this conduct portrays," on the stated ground that there is nothing "to fear from honest record keeping."

This Court has held that the Fifth Amendment, operating through the Fourteenth, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U. S. 609 at 615. It is wholly inconsistent with that principle that an inference of guilt can be drawn from the failure to keep and to produce records which

would establish innocence. The assertion that the court below could infer "what was going on" from the absence of records is contradicted by *Malloy v. Hogan,* 378 U. S. 1 and *Spevack v. Klein,* 385 U. S. 511 (1967). The State of Ohio, it must be noted, does not compel its bar to keep any records at all. The lawyers duties will require him to account to his client, and to the internal revenue service, but he is not required to keep books in order to account to a disciplinary board.

SUPPLEMENTAL BRIEF ON CHARGE 8— LOANS TO CLIENTS.

Lending Sustenance to Oppressed Clients Is Not Equivalent to Misconduct.

The Ohio Supreme Court imposed indefinite suspension of Petitioner on Charge 8—advancing support to two clients. The Court of Appeals did not disbar upon that ground. We brief the point against the possibility some of the members of this Court might feel that even though Charge 13 would not justify disbarment, Charge 8 would. If it is the pleasure of this Court only to review the single ground stated by the Court of Appeals in support of its decision to disbar Petitioner, then no consideration need be given to this section of the brief.

The facts with respect to the loans to two clients are not in dispute. Clara Beighley and Naomi Clark were both widowed by the death of their husbands in railroad accidents. Petitioner represented both of them in FELA actions. It is admitted that over a period of four years Petitioner advanced to Mrs. Beighley $1,025.00 and that he advanced to Mrs. Clark $611.00 over a period of three and one-half years. These loans were made at various times, in modest individual amounts, beginning some months after the widows had retained Petitioner, and were made

at their supplication to buy necessities for survival. The amount of such advances were repaid by the clients out of the settlements later obtained in both of these cases. Petitioner testified that he did *not* offer to advance money to these clients in order to obtain their lawsuits (A. 115a), and there is no evidence to the contrary with regard to this. The Supreme Court of Ohio, overruling earlier decisions, held that these advances violated Canons 10 and 42 of the American Bar Association, and justified suspension of Petitioner's right to practice.

The Court's opinion says:

> "It is obvious that, where the advancement of living expense is made, as in the instant case, *to enable a disabled client and his family to survive,* any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. *In effect,* the attorney has purchased an interest in the subject matter of the litigation that he is conducting." (176 Ohio St. at 265. Emphasis added. Appendix 3a.)

This is extraordinary analysis. The court found that in the instant case the client's family was in desperate straits and could not survive without help. Would it then be the lawyer's duty to settle cheap, to avoid the economic strangulation of his client? It would be a strange moral code that would applaud starvation as an ethical defense weapon. It is peculiar morality that would compel a lawyer to stand by, unmoved by any sense of charity, while the widow and children he represents suffer loss of the family furniture, loss of heat and light, loss of clothing, or loss of food from the table. A lawyer admitted to practice before the Federal Bar ought to be able to lend to impoverished clients the funds essential to main-

tain life. In doing so he is the more charitable if the case is so doubtful that he might never be repaid. He is the more charitable if, after the loss of the case, he foregoes his ability to take judgment and garnish the pension payment, and instead makes a gift of the monies loaned to his defeated clients.

It may well be, as it was in fact in one of the instant cases, that the liability is clear and eventual recovery is reasonably certain. In such case there is no true charity in the loan. It becomes a perfectly reasonable transaction in which a client with good security—the pending case—has urgent existing need. In such a situation the lawyer protects the client and protects his own contingent interest by making the loan which enables the client to resist inadequate settlement offers and still survive until trial time. Where liability is doubtful, and security for repayment non-existent, the lawyer is the more humane. Is he then the more immoral?

The weakness of the Ohio Supreme Court's position becomes instantly apparent when we consider that a contingent fee is universally held to be ethical and proper. It is commonplace for a plaintiff's attorney to represent his client for a quarter interest or third interest in the eventual recovery. He gives consideration—his professional services. He acquires an interest in the proceeds of the case by trading the value of his work. He may also advance expenses, subject to an obligation to reimburse—even though there may not be much expectation of reimbursement if the case is lost and his client is penniless. Let us assume that a lawyer who has a one-third contingent fee and has advanced $200.00 in expenses makes three monthly finance payments to save his client's furniture amounting to perhaps $240.00. It is ethical, says the Supreme Court of Ohio, for the lawyer to own

one-third of the proceeds of the case. It is ethical for the lawyer to advance the $200.00 in litigation expenses and reimburse himself from the eventual settlement. What then is the alchemy which makes it unethical, immoral, and reprehensible for the lawyer to make a further loan for his needy client's living expenses?

A good, kind, and generous act cannot be made bad merely by calling it bad. A great majority of our people would consider that a helping hand to the oppressed is good, following the teaching of St. Matthew:

> "When saw we thee ahungered, and fed thee? or thirsty, and gave thee drink * * * or naked, and clothed thee? * * * Inasmuch as ye have done it unto one of the least of these, my brethren, ye have done it unto me."

Canon 10 does not prohibit benevolence. Canon 10 is a specific prohibition against the practice known to the common law as champerty. The essence of champerty is the purchase of an interest *in the subject matter* of the litigation, classically an interest in land. Historically the doctrine goes back to the thirteenth century when church and crown contested over titles to land, and powerful feudal barons sometimes intervened to help a freeholder in return for a share of the property. Winfield, in "The History of Maintenance and Champerty," 35 L. Q. Rev. 50, 56-59 (1919) says that the first statute to mention champerty by name was 13 Edw. 1 (St. West. 11) wherein Cap. 49 enacts:

> "The Chancellor, Treasurer, Justices, nor any of the King's house, Clerk ne lay, shall not receive any church nor advowson of a church, land nor tenement in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers, nor shall take no reward thereof. * * *."

Centuries later Blackstone defined champerty with a broader meaning:

> "In our sense of the word it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right but not the possession, is not assignable at common law, because no man should purchase any pretence to sue in another's right." (4 *Blackstone, Commentaries,* 135 [3d Ed. 1884]).

A modern scholar, writing on the general subject of maintenance and champerty, observes that the rule of Blackstone's day has been modified, but still restricts purchase of claims by lawyers:

> "However, the power to assign causes of action has been greatly extended and, in general, such rights are freely transferable * * * The position of the lawyer in regard to assignments has been treated as requiring special restrictions. Because of their ability to evaluate a claim more accurately than the assignor, and because of a fear of abuses in professional conduct if lawyers are allowed to buy claims to litigate for their personal profit, assignment or purchase of property in litigation by lawyers is specifically prohibited by many modern statutes." (F. B. MacKinnon, "Contingent Fees for Legal Services—A Report of The American Bar Foundation." [1964] p. 38.)

A leading modern text on professional ethics, "Legal Ethics" by Henry Drinker (1953) says this about Canon 10:

> "This Canon must be read in connection with Canon 28 forbidding the stirring up of litigation, as part of the age-long policy which gave rise to the statutes against champerty, maintenance and barratry. Its purpose is to prevent lawyers from the temptation to litigate on their own account. Significantly,

> the Canon uses the term 'purchase', not 'acquire' * * * Nor, despite some statements to the contrary in Committee opinions, is it believed that, particularly in view of Canon 13 [allowing a contingent fee]. Canon 10 precludes in every case an arrangement to make the lawyer's fee payable only out of the results of the litigation. The distinction is between buying an interest in the litigation as a speculation, which Canon 10 condemns, and agreeing, in a case which the lawyer undertakes primarily in his professional capacity, to accept his compensation contingent on the outcome." (Drinker, "Legal Ethics" [1953] p. 99.)

One of the earliest codes of ethical standards in this country was Hoffman's Fifty Resolutions in Regard to Personal Deportment, written by David Hoffman of the Baltimore Bar for the guidance of young practitioners in 1836. They are reproduced in Appendix E of Drinker's "Legal Ethics" pp. 338-351. Hoffman's Resolution XXIV provides, in significant part:

> "I will never be tempted by any pecuniary advantage, however great, nor be persuaded by any appeal to my feelings, however strong, to purchase, in whole or in part, my client's cause. *Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if I am not, then to induce others to do so.* But in no case will I permit either my benevolence or avarice, his wants or his ignorance, to seduce me into any participation of his pending claim or defense * * *. And though I have thus strongly worded my resolution, I do not thereby mean to repudiate, as wholly inadmissible, the taking of contingent fee * * *. Were this denied to the poor man, he could neither prosecute nor defend. All of this differs essentially from the object of my resolution, which is against purchasing, in whole or in part, my client's rights, after the relation of client and counsel, in respect to it, has been fully

established—after the strength of his case has become known to me—after his total pecuniary ability is equally known—after expenses have been incurred which he is unable to meet—*after he stands to me in the relation of a debtor and after he desires money from me in exchange for his pending rights* * * *." (Emphasis added.)

It must be apparent from the history of the doctrine of champerty, and the statutes, resolutions and canons condemning it, that the evil of the practice is the speculation for profit in the outcome of the case. A lawyer may not buy at a fixed price an individual interest in the land in litigation, nor a percentage of the recovery in a contested claim. In the instant case, the Petitioner, Ruffalo, did not purchase anything. He bought no rights in the litigation. He did not speculate, and could not profit from his kindness. He simply made a loan to a desperately needy client. At best, he could recover the exact amount of the loan. At worst, he would be a creditor holding an uncollectible debt. He stood in the relation of creditor to debtor—which Hoffman approved. He did not exchange the debt for an interest in his client's rights. He acquired no interest in the *subject matter* of the litigation, which was an unliquidated claim for uncertain damages.

The Supreme Court of Ohio said that making a survival loan to a needy client was "in effect" the purchase of an interest in the subject matter. To say that a loan is "in effect" a purchase is an outright distortion; it violates Drinker's admonition that the difference between "purchase" and "acquire" is significant. Furthermore, the Petitioner did not acquire any "interest" in his client's rights. He acquired only a debt, which could not be enlarged beyond its fixed dollar amount no matter how great the recovery might be. It will not do to say that an attorney

who has in fact made a loan has "in effect" made a "purchase." This does not interpret Canon 10. It rewrites it.

The Ohio Supreme Court held further that making a loan so that a client could buy food is a violation of Canon 42, which reads:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement."

The only prohibition in this Canon is the prohibition against bearing the expenses of litigation. There is no prohibition whatever against paying the expenses of sustenance. Even as to expenses of litigation the prohibition is qualified—the lawyer may advance them. The fact that Canon 42 says that an attorney may advance litigation expenses subject to reimbursement does not make it say that those are the only advances that can be made. The more rational interpretation of the Canon is that when it forbids the lawyer from paying or bearing the expenses of litigation, it means only the expenses of litigation and not the expenses of living.

It does not, and should not prevent the lawyer from advancing—by loan or gift—the cost of essential corrective surgery or the cost of rehabilitation training to help his injured client return to work. If the Canon really means that a lawyer cannot advance any monies for the purpose of client survival, then it would be a simple matter for the draftsman to have said so. In view of the impressive body of precedent expressly approving survival loans to needy clients, the draftsman of the Canons should and would have stated the prohibition of such loans explicitly if that had been intended.

Hoffman, in his famous Resolutions, had said of impoverished clients as early as 1836:

> "Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, * * *." (Hoffman's Resolution XXIV, *supra.*)

The Minnesota Supreme Court in 1915 said in *Johnson v. Great Northern Ry. Co.*, 128 Minn. 365, 369-370, 151 N. W. 125, 127:

> "The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may, in a sense, tend to foment litigation by preventing a settlement from necessity; but we are aware of no authority holding that it is against public policy, or of any sound reason why it should be so considered."
>
> "It is generally held that a person, whether an attorney or layman, who furnishes assistance by money or otherwise to a poor man to enable him to carry on an action, is not guilty of maintenance * * *. *It is not against public policy for an attorney to loan his client money to enable him to carry on the suit.*" (Emphasis added.)

The year before the Ohio Supreme Court disciplined the Petitioner, the Connecticut Supreme Court had approved the conduct in question in *Grievance Committee of Fairfield County Bar v. Nevas,* 139 Conn. 660, 666-667, 96 A. 2d 802, 805 (1963) saying:

> "By loaning money to his client, the defendant put himself in a position where his personal interests might well become adverse to hers. The making of such a loan by a lawyer is not, however, necessarily unethical conduct. *It is unethical only if the loan is made to accomplish some purpose contrary to the client's welfare or if, in seeking repayment, the lawyer pursues practices which are unfair or unduly oppressive.*" (Emphasis added.)

In *People, ex rel. Chicago Bar Ass'n v. McCallum,* 341 Ill. 578, 589-590, 175 N. E. 827, 831 (1930) the Illinois Supreme Court said:

> "The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary for the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim."

There is much other authority to the same effect: *Hildebrand v. State Bar,* 18 Cal. 2d.816, 824, 117 P. 2d 860, 863 (1941); *In re Sizer,* 306 Mo. 356, 375, 267 S. W. 922, 928 (1924); *Bank of Chenango v. Hyde,* 4 Cow. 567 (N. Y. 1825); *State ex rel. The Florida Bar v. Dawson,* 111 So. 2d 427, 430 (Fla. 1959); *Reece v. Kyle,* 49 Ohio St. 475, 31 N. E. 747 (1892).

The Ohio Supreme Court said:

> "We cannot reconcile the majority opinion in *People ex rel Chicago Bar Association v. McCallum* (1930) 341 Ill. 578, 173 N. E. 827, on this question with Canons 10 and 42." (176 Ohio St. at 265, A. 3a.)

It would have been more accurate to say that *McCallum* and all the cases like it cannot be reconciled with the language that the Court wrote into Canons 10 and 42 by its distorted interpretation. Canon 10 forbids the purchase of an interest in the subject matter of the litigation. Canon 42 prohibits the payment of the expenses of litigation. *McCallum* approved loans of living expenses to needy clients. There is no conflict to reconcile.

There was a direct conflict between the decision of the Ohio Supreme Court in Petitioner's case and its earlier decision approving loans to poor clients in *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747. The Court observed that its earlier line of decisions, including *Reece v. Kyle*, where decided before the Court adopted the Canons of Professional Ethics, and said:

> "In view of the adoption of those canons, those cases would be no longer applicable to the extent that they are inconsistent with provisions of the canons." (176 Ohio St. at 265, A. 3a, 4a.)

Petitioner insists that there is no inconsistency. There is no provision of the Canons which describes and forbids the aid and assistance he gave. The state court reached its result only by holding that "in effect" he violated a new and retroactive interpretation of the Canons. The result denies Due Process on multiple grounds—lack of advance definition, retroactive interpretation of the Rules of Practice defining misconduct, retroactive enlargement of the narrow language of Canons 10 and 42, ex post facto overruling of prior precedent approving the practice, and a decision so arbitrary and irrational it cannot be reconciled with any reasonable standard of morality and justice.

CONCLUSION.

Petitioner asks this Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit, and order that court to reinstate his name upon the roll of counsel entitled to practice before it. Petitioner asks further that this Court grant him the right to continue to practice as a member of its bar.

Respectfully submitted,

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